Held, that the taxing officer had proceeded on a wrong principle, and that the bill of costs must go back for taxation."

I accordingly overrule the objection raised by Mr. Peddie and allow this application with costs to be taxed. The respondent's bill is remitted to the Assistant Registrar for taxation according to scale.

Objection overruled.

Solicitors: *Bannon & Bailey; Braddell & Ramani.*

Re LOH BOON NGHEE, DECD.

[O. C. J. (Hepworth J.) August 17, 1962]

[Penang — Summons-in-Chambers No. 133 of 1962 in Civil Suit No. 158 of 1952]

Executors and Administrators — Commission of — Probate and Administration Ordinance, 1959, s.43 — Principles that should guide a judge in his efforts to fix a fair remuneration.

The plaintiffs were the widow and son respectively of the deceased while the defendant was another son of the deceased. The deceased by his will appointed the defendant executor and trustee of his estate. Under the terms of the will the deceased bequeathed all his properties to the defendant upon trust to divide same and the accumulated income into ten equal shares of which the first plaintiff (widow) was to have two shares and the second plaintiff and the defendant four shares each. The date of distribution was June 5, 1952. On September 18, 1952 the plaintiffs issued a writ for administration of the real and personal properties of the deceased with all necessary enquiries and accounts in connection therewith upon the footing of wilful default. By an order of court of June 29, 1953 the statement of claim was amended and allegations were made that the defendant committed breaches of trust. On January 7, 1954 a deed of settlement was entered into between the plaintiffs and the defendant. By one of the terms of the settlement the plaintiffs withdrew the allegations of breaches of trust and it was specifically provided that the defendant should be at liberty to apply to the High Court for commission for acting as an executor under the said will. Accordingly the defendant applied to the court by way of Summons in Chambers which was adjourned into open court, for an order that his remuneration as an executor and trustee be fixed and paid out of the estate of the above-named deceased.

Held: (1) taking all the circumstances of the case and the fact that the defendant managed his own properties which were in the general area of those of the estate of the deceased and that there were persons employed to look after the estate properties the defendant will be adequately recompensed if a commission at 3% is allowed;

(2) it was not open to the plaintiffs to allege fresh breaches of trust which were not pleaded as they had specifically withdrawn allegations of breaches of trust in accordance with the terms of the deed of settlement.

The principles which should guide a judge in fixing remuneration for an executor or administrator under section 43 of the Probate and Administration Ordinance, 1959 considered. *Tan Soo Lock* v. *Tan Jiak Choo* (1) followed.

Case referred to:—

(1) *Tan Soo Lock* v. *Tan Jiak Choo* [1932] S.S.L.R. 6.

SUMMONS-IN-CHAMBERS.

O. L. Phipps for the plaintiffs.

Ong Huck Lim for the defendant.

Cur. Adv. Vult.

Hepworth J.: This is a Summons-in-Chambers which has been adjourned into open Court for argument on behalf of the defendant, the sole executor and trustee of the will of Loh Boon Nghee, deceased, for an Order that his remuneration as such executor and trustee may be fixed and paid out of the estate of the said deceased and that the costs of this application be taxed between solicitor and client and paid out of the said estate.

For the better understanding of this matter it is necessary to trace briefly the history of these proceedings.

The 1st plaintiff is the widow and the 2nd plaintiff is one of the sons of the said Loh Boon Nghee, deceased. The defendant is also a son of the said deceased. The said Loh Boon Nghee, deceased, died on the 6th June, 1945, having by his will dated the 23rd February, 1945, appointed the defendant the executor and trustee thereof. Probate of the said will was duly granted to the defendant on the 28th October, 1946.

Under the terms of the said will the said Loh Boon Nghee, deceased, bequeathed all his residuary estate to the defendant upon trust to divide the same and the accumulated income by way of compound interest thereof into ten equal shares of which the 1st plaintiff was entitled to two shares and the 2nd plaintiff and the defendant to four shares each. Distribution was to be made seven years after the death of the deceased, that is to say the 5th June, 1952.

On the 18th September, 1962, the plaintiffs issued a writ (Penang High Court Civil No. 158 of 1952) alleging that they had made frequent application to the defendant for division of the property and payment of the shares due to them and also for accounts in connection with the administration of the said estate but he had wilfully neglected and/or refused to comply with the plaintiffs' request. The plaintiffs therefore claimed administration of the real and personal estate of the said Loh Boon Nghee, deceased, with all the necessary enquiries and accounts upon the footing of wilful default. The defendant's defence was a denial that he had wilfully neglected and/or refused to comply with the request and that the distribution of the estate was proceeding.

By an order of court dated the 29th June, 1953, the statement of claim was amended and allegations were made that the defendant had committed breaches of trust, firstly, in that he had kept a personal account with the estate of the said deceased and had wrongly credited such account with certain sums of money, and secondly, in that he had failed to invest, as directed by the will, certain sums of cash in hand and at the bank.

On the 7th January, 1954, a Deed of Settlement was entered into between the plaintiffs and the defendant setting out terms upon which Penang High Court Civil Suit No. 158 of 1952

was to be settled. These terms of settlement were incorporated in an Order of Court dated the 15th January, 1954.

One of the terms of settlement was that the plaintiffs withdrew the allegations of breach of trust which had been made in the amended statement of claim. The plaintiffs also agreed to accept the audited accounts up to the 31st May, 1952, subject to any adjustment by the plaintiffs' Auditors, Messrs. Lee Hong Cheang & Co., and the estate's auditors, Messrs. Sam Ah Chow & Co., whose decisions were to be final. The defendant also agreed to submit accounts for the period 1st June, 1952, to the 31st January, 1954, on or before the 30th April, 1954, such accounts to be similarly adjusted by the said auditors, if necessary. It was also agreed that the defendant should be at liberty to apply to the High Court for commission for acting as executor under the said will. There were also other heads of agreement to which it is unnecessary to refer.

This Summons-in-Chambers was taken out as a result of the provision in the terms of settlement that the defendant should be at liberty to apply to the High Court for commission for acting as executor under the said will.

It is apparent that right from the start it was in the contemplation of the parties that the defendant should be granted some commission for acting as executor because otherwise it was pointless to make such a provision one of the terms of settlement. Any objection on the part of the plaintiffs, therefore, to the claim for commission by the defendant must be, not on the basis that the defendant is not entitled to any commission, but on the basis that he is not entitled to the full amount of commission for which he is asking.

The defendant exhibited to his affidavit a provisional statement of income on which he submitted that the trustee's remuneration should be computed showing that he had during the years 1945 to 1952 collected income from the Penang and Kedah properties amounting altogether to $897,726.58. The defendant claimed that he was entitled to 5% of this sum.

At the outset of the hearing I indicated to Mr. Phipps, who was appearing for the plaintiffs, that we were dealing simply and solely with the question of commission and that it must be borne in mind that the action was settled. I said this because it appeared to me from two affidavits which had been filed by the 2nd plaintiff that the 2nd plaintiff was saying that no commission whatever should be paid to the defendant and alleging wrongful actions by the defendant during the years 1945 to 1952 as his reason for this. In spite of this Mr. Phipps has proceeded throughout the hearing in attacking the conduct of the defendant as executor although the action has been settled. What the 2nd plaintiff has been endeavouring to do is to prove that the defendant looked after his own properties at the same time as he looked after the estate's properties, that two offices, one in Penang and one at Lunas, were used for these purposes and that the costs of running these offices, including salaries, telephone, light, car, lorry and so on, were all charged to the estate and were not paid by the defendant. This is quite clearly an allegation of the most gross breach of trust on the part of the defendant. In my opinion in the particular circumstances of this case this is not a matter which can be taken into consideration in assessing what commission the defendant is entitled to. In Civil Suit No. 158 of 1952 the breaches of trust to which I have referred were alleged. These allegations of these breaches of trust have been withdrawn by the plaintiffs. The fresh breach of trust now alleged was not pleaded and accordingly in my view it is not open to the plaintiffs to allege it now.

Provisions for payment of commission to an executor are now contained in section 43 of the Probate and Administration Ordinance, 1959. The principles that should guide a Judge in his efforts to fix a fair remuneration are set out in *Tan Soo Lock* v. *Tan Jiak Choo*.[1] Payment of remuneration is at the discretion of the Court. The conduct of the administration is a vital consideration. The commission varies according to the nature of the estate administered and the trouble and pains necessarily taken by the executor, although the commission should be less where heavy costs have been incurred through professional assistance having been obtained The question does arise, however, whether an original or derivative beneficiary ought to have a commission of the same amount or of less amount than an executor who is not a beneficiary. In his judgment in *Tan Soo Lock's* case Murison C.J. said that where the benefiting executor is a residuary legatee or legatee taking an aliquot share of the estate, he pays qua beneficiary in the same proportion as he receives qua executor, and the matter thus appears to adjust itself mechanically.

The plaintiffs have alleged that the defendant's properties in Kedah were generally in the same area as those of the estate and the trouble and pains he has been put to as executor are very small because he would in any event have been looking after his own properties at the same time. The defendant alleges that he looked after his own affairs in his spare time.

The plaintiffs also say that there was a Manager and office and estate staffs to look after the estate and so the defendant had little to do. The defendant replies that it is not necessary that an executor should personally perform the acts. There must be someone to look after the properties and there must be clerks and rent collectors employed. It was his duty to see that the work was done properly.

The figures which the defendant has produced as to the amount of income collected by

him from 1945 to 1952 are presumably taken from the audited accounts which were in existence at the time of the settlement, were referred to in paragraph 2 of the terms of settlement, and which eight years later have not apparently been queried. The plaintiffs have produced no evidence to show that the figures produced by the defendant are not obtainable from those accounts, nor that they are in any other way wrong. It seems to me, therefore, that the assessment of commission can be based on these figures.

There is a sum remaining in Court from which the commission can be paid. It must be borne in mind however that the defendant is entitled to two-fifths of this sum, so that two-fifths of any commission paid to him out of this sum will be paid out of his share. Put in another way an order for payment of commission of 5% will mean a net gain to the defendant of 3% This is the mechanical adjustment to which Murison C.J. was referring.

In my opinion the facts that the defendant managed his own properties which were in the general area of those of the estate and that there were persons employed to look after the estate properties are facts which should be taken into consideration when assessing the commission in this case. I think that the defendant will be adequately recompensed if I allow him commission at 3% on the amount of $897,726.58, which will give a figure to the nearest $100 of $26,900 (which adjusts itself mechanically to a figure of $16,200).

The costs of this application will be taxed as between solicitor and client and paid out of the estate.

Order accordingly.

Solicitors: *Hogan, Adams & Allan; Ong Huck Lim & Co.*

GURBACHAN SINGH v. SEAGROTT & CAMPBELL (No. 2)

[C. A. (Thomson C.J., Hill and Good JJ.A.) August 20, 1962]

[K.L. — F.M. Civil Appeal No. 16 of 1962]

Practice and Procedure — Appeal to Court of Appeal — Appeal not "brought" within time prescribed by O.58 — Service of Notice out of time — Notice of preliminary objection by respondent — R.S.C., 1957, O.58 rr.1A(1), 2 and 15 — Construction of r.15.

At the trial in this case the judgment was delivered on April 3, 1962. Notice of appeal was filed on 1st or 2nd May, but the notice was not served on the respondents or their solicitors until May 9, 1962. On May 10th the respondents' solicitors sent a Notice of Preliminary Objection to the appellant's solicitors intimating that at the hearing of the appeal they would apply for the appeal to be dismissed on the ground that they were not served with notice of appeal within the time limited for appeal whereby the appellant was in breach of O.58 rr.1A(1), 2 and 15.

The appellant took no steps to obtain special leave of the full Court of Appeal but the respondents took the precaution of asking security for costs which they failed to obtain.

Held: (1) an appeal can only be said to be "brought" within O.58 r.15 when the notice of appeal is served on the respondents. As this was not done within one month from the entry of the judgment, the appeal was out of time, and therefore the preliminary objection must succeed and the appeal should be struck out with costs to the respondents;

(2) the procedure followed by the respondents, that is to say, giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal came on for hearing was the correct one.

Cases referred to:—

(1) *Christopher* v. *Croll* (1885), 16 Q.B.D. 66.

(2) *In re Helsby* [1894] 1 Q.B. 742.

COURT OF APPEAL.

Dato' R. P. S. Rajasooria for the appellant.

A. L. Hills for the respondents.

Thomson C.J. (delivering oral judgment): This is an appeal from a judgment of Mr. Justice Suffian which was delivered on 3rd April, 1962. A preliminary objection has been taken by the respondents and we must deal with that *in limine*.

What happened was this. Judgment was entered on 3rd April and notice of appeal against that judgment was filed on the 1st or 2nd of May. The notice was not, however, served on the respondents or their solicitors until the 9th of May. It is said that by reason of that the appeal was not brought within the time prescribed by Order 58 and therefore cannot be proceeded with except by special leave of the full Court of Appeal which has not at any time been asked for.

The relevant rules are rules 1A(1), 2 and 15. Rule 1A(1) says :—

" Appeals to the Court of Appeal shall be by way of re-hearing and shall be brought by giving notice of appeal."

Rule 2 says :—

" Notice of appeal shall be served on all parties directly affected by the appeal.....at the time of filing the notice of appeal."

Rule 15 says :—

" No appeal shall, except by special leave of the full Court of Appeal, be *brought* after the expiration of one month —".

The meaning of the word "brought" was considered by the English Court of Appeal in the case of *Christopher* v. *Croll*.(1) That was a case arising under the old English Order LVIII rule 15, that is the rule as it existed before 1955, which said :—

" Except with the leave of the Court or judge by whom the judgment or order appealed from was given or made, or of the Court of Appeal, no appeal from any interlocutory order shall be brought after the expiration of fourteen days."

In relation to that Lord Esher, M.R., said :—

" Rule 1 of Order LVIII says that 'all appeals should be brought by notice of motion', and rule 15 provides that no appeal from a final judgment in an action shall be 'brought' after the expiration of a year. This seems